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No. 06-1505 4-11-08

In the Supreme Court of the United States

CLIFFORD B. MEACHAM, ET AL.,
Petitioners,

v.

KNOLLS ATOMIC POWER LABORATORY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* GENERAL ELECTRIC CO. SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. IMPOSING ON EMPLOYERS THE BURDEN OF PROVING THE REASONABLENESS OF EMPLOYMENT DECISIONS BASED ON FACTORS OTHER THAN AGE IS UNSUPPORTED BY STATUTE AND CONTRARY TO THE HOLDINGS OF THIS COURT	6
A. The Court's Pre-1991 Decisions Unequivocally Place the Ultimate Burden of Persuasion on the Plaintiff	8
B. The Court's Pre-1991 Allocation of the Ultimate Burden of Persuasion Remains Applicable to Disparate-Impact Claims Arising under the ADEA	10
C. Petitioners' Characterization of the ADEA's "Reasonable Factors Other than Age" Provision as an Affirmative Defense Is Mistaken	16

TABLE OF CONTENTS—Continued

	Page
II. PETITIONERS' REALLOCATION OF THE BURDEN OF PROOF TO DEFENDANTS PLACES ON EMPLOYERS AN UNWARRANTED AND ONEROUS BURDEN THAT WILL BE DETRIMENTAL TO EMPLOYERS' LEGITIMATE EFFORTS TO MAINTAIN A FLEXIBLE AND COMPETITIVE WORKFORCE	18
A. The Policies and Employment Criteria Used by KAPL in Making the RIF Decisions Challenged Here Are Plainly Job-Related and Incorporate Elements Commonly Used by Numerous Other Employers	20
B. Accepting Petitioners' Reallocation of the Burden of Proof Would Create Undue Pressure on Employers to Abandon Commonplace Policies that Are Based on Sound Business Factors	22
C. Petitioners' Approach Is Inconsistent with the Intent of the ADEA to Preserve Employer Discretion	29
CONCLUSION	31

TABLE OF AUTHORITIES

CASES	Page
Arnett v. Kennedy, 416 U.S. 134 (1974)	22
Barnhart v. Pickrel, Schaeffer, Ebeling Co., 12 F.3d 1382 (6th Cir. 1993)	10, 11
County of Washington, Oregon v. Gunther, 452 U.S. 161 (1981)	16
Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226 (1983)	30
Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161 (7th Cir. 1992)	24
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978)	7, 8, 18, 25
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	6, 8
Hatcher v. General Electric, No. 98-6304, 2000 U.S. App. LEXIS 2837 (6th Cir. Feb. 22, 2000)	3
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993)	17, 30
Jorgensen v. Modern Woodmen of America, 761 F.2d 502 (8th Cir. 1985)	30
Keene State College v. Sweeney, 439 U.S. 24 (1978)	8
Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980)	30
Lenhart v. General Electric Co., 140 F. Supp. 2d 582 (W.D.N.C. 2001)	3
Lorillard v. Pons, 434 U.S. 575 (1978)	11
Marshall v. Westinghouse Electric Corp., 576 F.2d 588 (5th Cir. 1988)	16
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	8, 11
McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995)	30

TABLE OF AUTHORITIES—Continued

	Page
Meacham v. Knolls Atomic Power Laboratory, Inc., 381 F.3d 56 (2d Cir. 2004)	*passim*
Meacham v. Knolls Atomic Power Laboratory, 461 F.3d 134 (2d Cir. 2007)	*passim*
Parcinski v. The Outlet Company, 673 F.2d 34 (2d Cir. 1982)	30
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)	29
Rush v. United Technologies, 930 F.2d 453 (6th Cir. 1991)	28
St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)	9
Schwager v. Sun Oil Co. of Penn., 591 F.2d 58 (10th Cir. 1979)	10
Smith v. City of Jackson, 544 U.S. 228 (2005)	*passim*
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	9, 23
United Steelworkers v. Weber, 443 U.S. 193 (1979)	29
Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)	*passim*
Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1989)	*passim*
STATUTES	
Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* (2007):	
Section 4(a), 29 U.S.C. § 623(a)	16
Section 4(f)(1), 29 U.S.C. § 623(f)(1)	4, 14, 16
Section 4(f)(2), 29 U.S.C. § 623(f)(2)	30
Section 4(f)(3), 29 U.S.C. § 623(f)(3)	30
29 U.S.C. § 206(d)(1)(iv)	16

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page
113 Cong. Rec. 1,377 (1967)	16
H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2 (1963) (*reprinted in* 1964 U.S.C.C.A.N. 2392)	29

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BRIEF OF *AMICUS CURIAE* GENERAL ELECTRIC CO. SUPPORTING RESPONDENTS

Amicus curiae General Electric Co. ("GE"), by its undersigned counsel, respectfully submits this brief in support of respondents Knolls Atomic Power Laboratory ("KAPL"), *et al.*, and in support of affirming the decision of the court of appeals, *Meacham v. Knolls Atomic Power Laboratory*, 461 F.3d 134 (2d Cir. 2007) ("*Meacham II*") (Pet. App. 1a-32a).[1]

[1] Counsel for both parties have consented to the filing of *amicus* briefs. Their consents have been filed with the Clerk of this Court. In compliance with Rule 37.6 of this Court, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no party or entity other than *amicus* made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

Amicus curiae General Electric is one of the largest and most diversified corporations in the world. Since its incorporation in 1892, GE has developed a wide variety of products across a diverse spectrum of business enterprises. GE's various business units provide a broad array of goods and services throughout the United States and the world. Doing business through numerous consolidated operating divisions, GE's products and services include aircraft engines, appliances, capital services, industrial systems, lighting, medical systems, the NBC television network, power systems, and transportation systems. GE's diverse business interests often lie in dynamic and cutting-edge industries. For instance, GE previously owned Knolls Atomic Power Laboratory, before divesting its interest to Martin Marietta Corp. in the early 1990s.

Across these various business enterprises, GE currently employs thousands of persons in the United States, and thousands more around the world. GE makes countless employment decisions that potentially are subject to the requirements of the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621 *et seq.* (2007). Accordingly, GE has a vital interest in the proper application of the ADEA.

GE also has a direct interest in the proper disposition of the issue raised in this case. GE and its operating divisions use an employee-ranking matrix that incorporates elements similar to those used by KAPL, including reliance on managerial assessments and the criticality and flexibility factors

specifically challenged by petitioners here.[3] Because of the diversity of its business activities, GE has broad experience bearing on the importance of permitting employers, in making difficult employment decisions, to rely on managerial discretion, to consider the criticality of an employee's skills, and to evaluate an employee's flexibility adapting to new requirements and competitive demands.

Unless the judgment of the court of appeals is sustained, GE—along with numerous other companies, both large and small—will be obliged, unnecessarily, to revisit its personnel policies and to consider the adoption of alternative measures that limit managerial discretion and minimize allegedly subjective elements, even though the criteria currently used by GE are plainly based on legitimate and sound business needs. Such an outcome will adversely affect the business interests of GE and other employers, and ultimately will make it significantly more difficult for employers to remain competitive in global markets.

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[3] *See, e.g., Hatcher v. General Electric*, No. 98-6304, 2000 U.S. App. LEXIS 2837, at *3-4 (6th Cir. Feb. 22, 2000) ("GE used a RIF matrix to rank those in the same job classification to determine who should be eliminated in RIF."); *Lenhart v. General Electric Co.*, 140 F. Supp. 2d 582, 586 (W.D.N.C. 2001) ("GEL [General Electric Lighting, an unincorporated operating division of GE,] uses an established set of written guidelines, including the RIF Identification Matrix, to rank salaried employees for layoffs. The supervisor . . . ranks employees in four categories, which are defined in the RIF Guidelines: Historical Performance, Flexibility, Criticality of Skills, and Company Service. The RIF guidelines provide that rankings are to 'be principally based' on the employee's performance over the previous 12 to 24 months.").

SUMMARY OF ARGUMENT

In pertinent part, the ADEA provides that "it shall not be unlawful for an employer . . . to take any action otherwise prohibited under . . . this section . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1) ("RFOA provision"). Contrary to petitioners' suggestion, construing this provision as an affirmative defense, and thus placing on employers the burden of proving the reasonableness of all manner of personnel decisions, is inconsistent with the Court's decisions interpreting the ADEA and Title VII. The Court's pre-1991 interpretation of the allocation of burdens under Title VII unequivocally placed the ultimate burden of persuasion on the plaintiff-employee in disparate-impact claims, and allocated only a burden of production to defendant-employers. That allocation of burdens remains applicable under the ADEA. Petitioners' attempt to reallocate the burden of proof on the issue of reasonableness to the defendant-employer is inconsistent with the Court's pre-1991 Title VII decisions, and contrary to the Court's holding in *City of Jackson*. Contrary to petitioners' suggestion, there also is no basis—statutory or otherwise—for construing the RFOA provision as an affirmative defense.

Petitioners' suggested allocation of burdens also fails to strike an appropriate balance between the needs of employers and the underlying objectives of the ADEA. Under the ADEA, private employers are entitled to exercise discretion in designing and implementing personnel policies, so long as those policies do not discriminate based on age. An employer's ability to exercise sound business judgment in making such employment decisions is critical to the

productivity, quality, and ultimate success of any business. Forcing employers to demonstrate and prove the reasonableness of their employment decisions not only is contrary to controlling precedent and unsupported by statute, but also would impose unwarranted and unduly onerous burdens on employers. As a result, petitioners' suggested reallocation of burdens would constrain countless employers from exercising their sound discretion in hiring or promoting employees based on the employers' business judgment relating to quality, productivity, and similar criteria. Instead, the risk of liability under the ADEA would create a formidable incentive for employers to adopt more generic personnel policies that, although more easily defensible, do not promote sound business objectives as efficiently.

This Court has been very clear in ruling that an employer has the right to use its discretion in choosing among equally qualified candidates, provided that the choice is not based on discriminatory criteria. Equally well-established is the principle that the ultimate burden of persuasion in disparate-impact cases should remain with the plaintiff. Petitioners' attempt to shift that burden, and thereby restrict an employer's legitimate interest in relying on managerial discretion in employment decisions, is both unsupported by law and unduly burdensome.

ARGUMENT

I. IMPOSING ON EMPLOYERS THE BURDEN OF PROVING THE REASONABLENESS OF EMPLOYMENT DECISIONS BASED ON FACTORS OTHER THAN AGE IS UNSUPPORTED BY STATUTE AND CONTRARY TO THE HOLDINGS OF THIS COURT.

In *Smith v. City of Jackson*, 544 U.S. 228 (2005) ("*City of Jackson*"), the Court held that a disparate-impact theory of recovery is available to workers suing their employers under the ADEA. Under that theory, plaintiffs may challenge an employer's facially-neutral employment practices without having to prove that the employment practice was motivated by an intent to discriminate, so long as the plaintiffs can demonstrate that the challenged employment decisions have a disproportionately adverse impact on employees over the age of forty. *Id.* at 243. *City of Jackson* thus extended the holding of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which held that Title VII incorporates a disparate-impact theory, to claims arising under the ADEA.[3]

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[3] The Court's decision in *Griggs* was based, in part, on the conclusion that Congress enacted Title VII "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-30. Petitioners overlook this critical fact in suggesting that the Court's later expansion of *Griggs* "to an employer's 'system of subjective decisionmaking,'" Pet. Br. 3 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1989)), suggests that all employment decisions that incorporate subjective elements are suspect. Because there is no similar history of discrimination against older workers, *see City of Jackson*, 544 U.S. at 240, there is no basis for presuming that managerial discretion or

The Court's holding in *City of Jackson* was not limited to the conclusion that the ADEA can support a disparate-impact theory. The Court also held that its "pre-1991 interpretation" of Title VII "remains applicable to the ADEA," and that the 1991 amendments to Title VII, which "*expanded* the coverage" of that statute, do not apply in the context of ADEA claims. 544 U.S. at 240 (emphasis added). As demonstrated below, the Court's pre-1991 interpretation of the allocation of burdens under Title VII unequivocally placed the ultimate burden of persuasion on the plaintiff-employee in disparate-impact claims, and allocated only a burden of production to defendant-employers. That allocation of burdens remains applicable under the ADEA. Petitioners' attempt to reallocate the burden of proof on the issue of reasonableness to the defendant-employer is inconsistent with the Court's pre-1991 Title VII decisions, and thus contrary to the Court's holding in *City of Jackson*. The reallocation of burdens urged by petitioners also is inconsistent with the Court's conclusion that the relief available under the ADEA is significantly narrower than that provided under Title VII.

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subjective employment factors that correlate with age function as a vehicle or proxy for latent, persistent discrimination. Indeed, mindful of the potential difficulties employers might face in justifying employment practices that include subjective or discretionary elements, the Court in *Watson* emphasized that "courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." 487 U.S. at 999 (quoting *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 578 (1978)).

A. The Court's Pre-1991 Decisions Unequivocally Place the Ultimate Burden of Persuasion on the Plaintiff.

The Court's pre-1991 decisions regarding the allocation of burdens in disparate-impact claims arising under Title VII place the ultimate burden of persuasion on the plaintiff, and hold that defendant bears *only* the burden of production. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-59 (1989).

After ruling in *Griggs* that Title VII can support a disparate-impact theory of recovery, the Court clarified the scope of the disparate-impact theory and the requirements for a successful claim in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). Spelling out the applicable evidentiary standards, the Court held that plaintiffs alleging that an employer's facially-neutral employment practices had an adverse impact on a Title VII-protected class initially must (1) identify "the specific employment practice that is challenged"; (2) present statistical evidence of the disparity complained of; and (3) prove causation. *Id.* at 994. Once the plaintiff satisfies its prima facie burden, the Court explained that, to rebut plaintiff's showing, the defendant must offer evidence that the challenged practice is job-related or justified by business necessity. *Id.* at 997-98. As in disparate-treatment cases, the defendant in a disparate-impact case prior to 1991 was required merely to "articulate some legitimate, non-discriminatory reason for the employee's rejection." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *See also Keene State College v. Sweeney*, 439 U.S. 24, 24-25 (1978) (holding that employer need not "prove absence of discriminatory motive" to counter employee's claim); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577-78 (1978)

(explaining that defendant does not bear burden of proving that hiring procedure maximizes consideration of minority applicants). The defendant's burden thus is one of production, not of proof.

If the employer meets its burden of production, the inference of discrimination raised by the plaintiff's prima facie showing of an adverse impact is rebutted and thus "drops from the case." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981). Under the Court's pre-1991 case law, the plaintiff then must shoulder the burden to demonstrate that alternative policies or practices exist that would meet the employer's legitimate business goals without causing the disparate impact. *Watson*, 487 U.S. at 998. Under this now-familiar "burden-shifting" framework, although the plaintiff's prima facie showing shifts the burden of production to the defendant, the "*ultimate burden* of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." *Id.* at 997 (emphasis added). Thus, as in the disparate-treatment context, "the *ultimate burden* of persuading the trier of fact . . . remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253 (emphasis added). *See also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-11 (1993). The plaintiff thus continues to bear the burden of proving that relief under the statute is warranted.

One year after *Watson*, in *Wards Cove Packing Co. v. Atonio*, the Court again emphasized that plaintiffs asserting a disparate-impact claim under Title VII bear the "'ultimate burden'" of proof. 490 U.S. at 659 (quoting *Watson*, 487 U.S. at 997). In reaching that conclusion, the Court stressed that plaintiffs may not

prevail merely by pointing to the existence of a racial imbalance in the workforce. Rather, a plaintiff "must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." 490 U.S. at 657. As the Court reasoned, "to hold otherwise would result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.'" *Id.* (quoting *Watson*, 487 U.S. at 992). After *Watson* and *Wards Cove*, there can be no serious dispute that the Court's pre-1991 decisions interpreting Title VII allocated the burden of persuasion to the plaintiff, and placed only the burden of production on the defendant.

B. The Court's Pre-1991 Allocation of the Ultimate Burden of Persuasion Remains Applicable to Disparate-Impact Claims Arising under the ADEA.

As the Court emphasized in *Wards Cove*, the "'ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times.'" 490 U.S. at 659 (quoting *Watson*, 487 U.S. at 997). This pre-1991 allocation of burdens for disparate-impact claims arising under Title VII applies to claims arising under the ADEA. *See, e.g.*, *Schwager v. Sun Oil Co.*, 591 F.2d 58, 61 (10th Cir. 1979) (applying Title VII burden allocation to ADEA claim where employer terminated employee based on a reasonable factor other than age, and concluding that plaintiff bears "the ultimate burden of establishing his or her case of discrimination by a preponderance of the evidence"); *Barnhart v. Pickrel, Schaeffer, Ebeling Co.*, 12 F.3d 1382, 1390 (6th Cir.

1993) ("The plaintiff retains the ultimate burden of persuasion in an employment discrimination case.").[4]

This same allocation of burdens controls for disparate-impact claims asserted under the ADEA. As in the case of an employer rebutting a plaintiff's prima facie disparate-impact claim under Title VII prior to 1991, it is enough that the employer "articulate" a legitimate, non-discriminatory business reason for the challenged employment decision or practice. *McDonnell Douglas*, 411 U.S. at 802. The defendant does not thereby assume the burden of proof. Applying the Court's holdings in *Watson* and *Wards Cove* regarding the allocation of burdens under the third prong of the Title VII inquiry, it is the plaintiff that bears the burden to rebut the reasonableness of the factor (or set of factors) identified by the defendant as the basis for its employment decision. This is the only plausible allocation that imposes on plaintiffs the "ultimate burden of persuasion" in making a claim for adverse impact.

The Court's decisions consistently have recognized that the ADEA was patterned after Title VII, and (at least prior to the amendment of Title VII in 1991) the Court has adopted parallel constructions of the burdens in cases arising under the two statutes. As the Court has observed, Congress relied heavily on the language and scope of Title VII in drafting the ADEA. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 584

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[4] Although *Barnhart* involves a disparate-treatment claim, there is no basis for distinguishing the plaintiff's ultimate burden in the two contexts. *See Watson*, 487 U.S. at 987 ("The distinguishing features of the factual issues that typically dominate in disparate-impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used.").

(1978) ("there are important similarities between [Title VII and the ADEA] . . . both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII"). The Court has ruled that, because Congress intended the two statutes to have "similar purposes," it is "appropriate to presume that Congress intended that text to have the same meaning in both statutes." *City of Jackson*, 544 U.S. at 233.

The Court's decision in *City of Jackson* strongly suggests that the Court's pre-1991 allocation of burdens under Title VII remains applicable in the context of disparate-impact claims brought under the ADEA.[5] For instance, in considering whether plaintiffs satisfied their prima facie burden, the Court concluded that "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact." 544 U.S. at 241. In reaching that conclusion, the Court expressly applied the *Wards Cove* requirement that the plaintiff is required to "'isolate[] and identify[] the *specific* employment practices that are allegedly responsible for any observed statistical disparities.'" *Id.* (quoting *Wards Cove*, 490 U.S. at 656) (emphasis in original). Petitioners' argument that the Court's decision in *City of Jackson* does not support allo-

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[5] Justices O'Connor, Kennedy, and Thomas all concluded in *City of Jackson* that the burden formulation set forth in *Wards Cove* and *Watson* controls under the ADEA, and thus "once the employer has *produced* evidence that its action was based on a reasonable nonage factor, *the plaintiff bears the burden of disproving this assertion.*" 544 U.S. at 267 (O'Connor, J., concurring) (citing *Wards Cove*, 490 U.S. at 659-60; *Watson*, 487 U.S. at 997) (emphasis added).

cating the burden of proof to plaintiffs ignores this critical fact. It also leads to the incongruous result that the burden *Wards Cove* places on Title VII plaintiffs in satisfying their prima facie obligations applies under the ADEA, but the *Wards Cove* holding that plaintiffs bear the ultimate burden of persuasion does not. There is no support in the Court's decision in *City of Jackson* or elsewhere for cherry-picking from prior precedent in this manner.

The Court also held in *City of Jackson* that "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." 544 U.S. at 240. The Court explained that Congress' 1991 amendments "expanding" the scope of relief available under Title VII do not apply to claims arising under the ADEA. *Id.* Contrary to petitioners' suggestion, Pet. Br. 46-49, *City of Jackson* does not support the proposition that the Court intended to apply only those aspects of its pre-1991 Title VII decisions construing "identical language" in Title VII and the ADEA to disparate-impact claims arising under the ADEA. Rather, the point was that the 1991 amendments to Title VII left the ADEA unchanged and thus left the *Wards Cove* allocation of burdens undisturbed with respect to the ADEA.

Petitioners' reading also ignores that the "business necessity" justification applied under Title VII serves a parallel function to the RFOA provision under the ADEA—that is, permitting an employer to contest a plaintiff-employee's prima facie case by identifying legitimate, non-discriminatory business justifications for the practice or policy in question. Indeed, before *City of Jackson*, courts frequently applied Title VII's business-necessity analysis to ADEA disparate-impact claims. *See, e.g., Meacham v. Knolls Atomic*

Power Laboratory, Inc., 381 F.3d 56 (2d Cir. 2004), *vacated*, 544 U.S. 957 (2005) ("*Meacham I*") (Pet. App. 33a-69a). This Court rejected that approach in *City of Jackson*, not because the two inquiries were so dissimilar that a different allocation of burdens was warranted, but because the text of the ADEA required a lower threshold for defendants to rebut a plaintiff's prima facie showing of adverse impact. 544 U.S. at 240-42.

Properly construed, *City of Jackson* ruled that the reasonableness inquiry required under Section 4(f)(1) of the ADEA *replaced* the business-necessity prong of the *Wards Cove* framework. 544 U.S. at 240-42. As the court of appeals here correctly recognized, simply adding the reasonableness inquiry on top of the three-part *Wards Cove* framework is "an unnatural reading of *City of Jackson*" that "would introduce a redundant (and counterintuitive) step in the analysis." *Meacham II*, 461 F.3d at 141 n.5 (Pet. App. 10a n.5). *Wards Cove*'s ruling that defendants must bear only the burden of production thus should apply with equal force to claims arising under the ADEA.

Petitioners' approach also would be inconsistent with the Court's holding in *City of Jackson* that "the scope of disparate-impact liability under ADEA is narrower than under Title VII." 544 U.S. at 240. If petitioners were correct and defendants were required to bear the burden of proof on reasonableness, plaintiffs asserting a disparate-impact claim would need to do no more than satisfy their prima facie obligation to identify specific employment practices that, although facially-neutral and not motivated by discriminatory intent, nonetheless have an adverse impact on workers that correlates with age. Under such an approach, plaintiffs could prevail solely by

meeting their prima facie burden. Such a result would greatly *expand* an employer's potential liability under the ADEA as compared to the pre-1991 Title VII, under which the employee was required to bear the ultimate burden of persuasion. This is especially true because plaintiffs may meet their prima facie burden through the introduction of statistical evidence of an adverse impact.[8] *See Watson*, 487 U.S. at 994 (plaintiff may satisfy prima facie burden by "offer[ing] statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group"). Petitioners' approach is further flawed because it disregards the court of appeals' accurate observation that a plaintiff's prima facie showing "is not itself necessarily probative of whether [a defendant's] business justification for particular features of its IRIF was 'reasonable.'" *Meacham II*, 461 F.3d at 145 (Pet. App. 18a).

Because there is no basis under the ADEA for disregarding the *Wards Cove* allocation of the ultimate burden of persuasion, the Court's decision in *City of Jackson* provides compelling support for applying the *Wards Cove* burden scheme to ADEA claims. Under that scheme, the plaintiff retains at all times the ultimate burden of persuasion.

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[8] Requiring plaintiffs to bear the burden only for this prima facie showing also is contrary to the Court's conclusion in *City of Jackson* that it is error to impose liability where plaintiffs "have done little more than point out that the [employment decision] at issue is relatively less generous to older workers than to younger workers." 544 U.S. at 241.

C. Petitioners' Characterization of the ADEA's "Reasonable Factors Other than Age" Provision as an Affirmative Defense Is Mistaken.

Section 4(f)(1) of the ADEA provides that: "it shall not be unlawful for an employer . . . to take any action otherwise prohibited under . . . this section . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). The plain language of the RFOA provision thus indicates that employment decisions that potentially correlate with age differentiation are *not unlawful* if they are based on legitimate, facially-neutral factors other than age.[7] Accordingly, Section 4(f)(1) does not create an affirmative defense, but rather functions as a definitional provision that underscores what "shall not be unlawful" discrimination under Section 4(a). *Id. See Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 591 (5th Cir. 1988) (RFOA clause is not an affirmative defense; it is a denial of the plaintiff's prima facie case). The ADEA's legislative history confirms this interpretation. *E.g.*, 113 Cong. Rec. 1,377 (1967) (statement of Secretary of Labor that

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[7] The federal government argues that interpretation of the "any other factor other than sex" provision of the Equal Pay Act, 29 U.S.C. § 206(d)(1)(iv), as an affirmative defense should support a similar reading of the ADEA's RFOA provision. This argument, however, ignores the fact that the Court already has concluded in *Co. of Washington, Oregon v. Gunther*, 452 U.S. 161 (1981), that the "any other factor other than sex" provision was intended to confine the Equal Pay Act to wage differentials attributable to sex discrimination, and thus to preclude disparate-impact claims under the statute. *Id.* at 169-71. It would be odd indeed if the provision of the Equal Pay Act that *precluded* disparate-impact claims was read to *broaden* such claims under the ADEA.

"[r]easonable differentiations not based solely on age . . . would not fall within the proscription").

City of Jackson supports this reading. In considering the function of the RFOA provision, the Court rejected the notion that it operates as "a safe harbor from liability." 544 U.S. at 238 (internal quotations and citations omitted). Instead, the Court concluded that "the RFOA plays its principal role by *precluding* liability if the adverse impact was attributable to a non-age factor that was 'reasonable.'" *Id.* at 239 (emphasis added). Construing the RFOA provision as an affirmative defense cannot be reconciled with this prior interpretation. *Id.* at 238 ("if an employer in fact acted on a factor other than age, the action would not be prohibited under subsection (a) in the first place"). *See also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) ("[T]here is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age.").

Contrary to petitioners' suggestion, there is no justification for construing the RFOA provision as an affirmative defense on the theory that employers "are better positioned to defend the reasonableness of their practices, having better access to the information that is most likely to be relevant to the jury's deliberation." Pet. Br. 19. Petitioners' reasoning is mistaken. Given modern discovery procedures, plaintiffs are equally able to offer proof as to the alleged unreasonableness of the challenged practice as employers are to defend it. More fundamentally, petitioners disregard the fact that the RFOA provision permits practices that are "reasonable," not merely those that are justified by "business necessity." *See City of Jackson*, 544 U.S. at 239-40.

Under this standard, the test for permissibility under the ADEA is whether the factors on which an employer relied are rationally related to a legitimate business goal. The plaintiff can challenge this rational relationship just as easily as the employer can defend it. In fact, placing the burden of proof on the employer invites the trier of fact to second-guess employers' business judgments, something this Court repeatedly has cautioned is not supported by statute and is not a task for which courts are well-suited. *Watson*, 487 U.S. at 999 ("'[C]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.'" (quoting *Furnco Const.*, 438 U.S. at 578)).

II. PETITIONERS' REALLOCATION OF THE BURDEN OF PROOF TO DEFENDANTS PLACES ON EMPLOYERS AN UNWARRANTED AND ONEROUS BURDEN THAT WILL BE DETRIMENTAL TO EMPLOYERS' LEGITIMATE EFFORTS TO MAINTAIN A FLEXIBLE AND COMPETITIVE WORKFORCE.

Private employers—whether they operate large, diversified enterprises or small businesses—are entitled to exercise their own discretion in choosing whom to hire, retain, promote, or fire, so long those decisions are not discriminatory. An employer's ability to exercise its sound business judgment in all manner of employment decisions is critical to the productivity, quality, and ultimate success of any business. The allocation of burdens urged by petitioners threatens that hallmark of American free enterprise. Forcing employers to demonstrate and prove the reasonableness of all manner of employ-

ment decisions not only is contrary to controlling precedent and unsupported by statute, but also would impose unwarranted and unduly onerous burdens on employers. Once an employer satisfies its burden of production by identifying the legitimate, non-discriminatory factors on which it based a challenged personnel decision, no further showing of reasonableness should be required. Although plaintiffs retain the opportunity to rebut the legitimacy of an employers' offered explanation by challenging the reasonableness of that decision, there is no principled basis for placing the burden of proof on employers.

Petitioners claim that the policies employed by KAPL in implementing its reduction in force ("RIF") program produced an adverse impact on older workers. According to petitioners, "the discretionary authority bestowed on lower level managers" and the decision to incorporate allegedly subjective factors such as "flexibility" and "criticality" in the RIF matrix resulted in "startlingly skewed results." Pet. Br. 8, 7. The court of appeals rejected this notion, properly concluding that "[a]ny system that makes employment decisions in part on such subjective grounds as flexibility and criticality may result in outcomes that disproportionately impact older workers; but at least to the extent that the decisions are made by managers who are in day-to-day supervisory relationships with their employees, such a system advances business objectives that will usually be reasonable." *Meacham II*, 461 F.3d at 146 (Pet. App. 19a). Accepting petitioners' suggested reallocation of the burden of proof would threaten the continued ability of employers to rely on managerial assessments and to incorporate such legitimate employment criteria in making employment decisions.

A. The Policies and Employment Criteria Used by KAPL in Making the RIF Decisions Challenged Here Are Plainly Job-Related and Incorporate Elements Commonly Used by Numerous Other Employers.

In implementing the RIF, KAPL required managers and supervisors for each unit to evaluate employees selected for potential termination, ranking them in a "matrix" based on four criteria: (1) performance; (2) flexibility; (3) criticality of the employee's skills; and (4) years of service. *See* JA 94-98. The RIF matrices ranked each employee according to his or her manager's assessment in these categories.

All available evidence supports the court of appeals' conclusion that the particular elements of KAPL's RIF policies challenged by petitioners—that is, the use of the "criticality" and "flexibility" criteria and the resulting reliance on managerial discretion—serve legitimate business goals. According to the record, respondents introduced evidence at trial establishing that these facially-neutral criteria evaluated factors considered essential to KAPL's ability to complete its existing project obligations and to compete for future projects. *Meacham I*, 381 F.3d at 74 (Pet. App. 59a). Specifically, the criticality factor enabled managers to assess an employee's skill level in performing those projects most important for KAPL's present and future success. The factor thus captured an employee's relative value on the job. JA 102-03. The flexibility factor enabled managers to evaluate whether an employee could contribute to multiple projects, or could be retrained to do so. JA 121-27. As respondents argued, and petitioners

failed to rebut, these factors were necessary to determine whether terminating a particular employee would undermine KAPL's ability to complete existing projects or would affect the quality of the work performed in a given unit. The criticality and flexibility factors were especially important given the changing nature of the government's demands on KAPL and the highly technical character of the nuclear-powered propulsion projects assigned to the lab. *Meacham I*, 381 F.3d at 74 (Pet. App. 59a) ("Unchallenged, KAPL's justification would preclude a finding of disparate impact.").

As to KAPL's reliance on the assessments of managers and supervisors, respondents' experts testified that KAPL's RIF policies, including "the subjective components of the IRIF," were "appropriate because the managers conducting the evaluations were knowledgeable about the requisite criteria and familiar with the capabilities of the employees subject to evaluation." *Meacham II*, 461 F.3d at 144 (Pet. App. 16a). As the court of appeals concluded, KAPL's RIF policies were designed "to reduce its workforce while still retaining employees with skills critical to the performance of KAPL's functions," and thus KAPL "advanced a facially legitimate business justification for the IRIF and its constituent parts[.]" *Id.* at 140 (Pet. App. 8a) (citations and quotations omitted).

The policies and criteria selected by KAPL plainly were designed to evaluate critical job-skills and other factors generally considered important in making employee retention decisions. The factors were thus rationally related to KAPL's business needs. Indeed, KAPL is far from the only company that employs such policies or relies on these particular criteria in making personnel decisions. To the contrary, the

record indicates that these factors are common elements in RIF policies throughout the corporate world. In fact, GE and many of its operating divisions rely on RIF policies that incorporate these precise elements. *See infra* at 2 n.2. As respondents' industrial psychology expert with "substantial corporate downsizing experience" testified at trial, these criteria are "ubiquitous components of systems for making personnel decisions." *Meacham II*, 461 F.3d at 144 (Pet. App. 16a) (quotations omitted).

B. Accepting Petitioners' Reallocation of the Burden of Proof Would Create Undue Pressure on Employers to Abandon Commonplace Policies that Are Based on Sound Business Factors.

To maintain a competitive advantage in today's dynamic global marketplace, employers must be able to rely on managerial assessments of employees and to incorporate factors such as employee flexibility in making employment decisions. *See Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring) (recognizing that sound business administration demands that an employer "must have wide discretion and control over the management of its personnel and internal affairs"). This is true for large and small companies alike. Given the vertical dimensions of many larger companies, employers need to be able to delegate human resource decisions to managers and rely on the discretionary judgments of front-line supervisors. For owners of many smaller businesses, it is not a realistic option to design and implement demonstrably objective policies and then defend the reasonableness of those policies in court. Regardless of the size of the business, employers should not be discouraged from relying on the judg-

ments of managers in making employment decisions. As this Court has long recognized, the demands of a competitive marketplace require that employers have the freedom to exercise such discretion. *See, e.g.*, *Burdine*, 450 U.S. at 259.

Accepting petitioners' reallocation of the burden of proof on the issue of reasonableness poses a serious risk to the continued ability of employers to exercise that freedom. Petitioners nevertheless contend that "there is no reason to think that placing the burden of meeting the modest requirements of the RFOA defense on the employer would lead to any unintended impairment of employer interests." Pet. Br. 36. Petitioners' argument is mistaken. Petitioners underestimate the effect that a newly-imposed obligation to prove the reasonableness of personnel decisions will have on employers. If this Court were to abandon *Wards Cove*'s conclusion that plaintiffs should bear the ultimate burden of persuasion, employers would face a significant disincentive to continued use of the legitimate, commonplace, and sound policies relied on by KAPL here. Forcing employers to prove the reasonableness of all manner of employment decisions would place on employers undue and unwise pressure to adopt more generalized employment policies that are less discretionary and more easily defensible in court but are less tailored to evaluate the true contribution of each employee and the needs of the business (*e.g.*, layoff policies based solely on seniority). Doing so necessarily would decrease the relative importance of sound business administration in designing such policies. Such an outcome would represent a serious and unwarranted setback to the ability of American

employers to compete in today's dynamic global markets.*

Petitioners' suggested reallocation of the burden of proof on the issue of reasonableness means that employers not only must *identify* the legitimate, nondiscriminatory factors on which it based the challenged employment decision, but also must *produce factual support* for the reasonableness of those factors. While it is important that employers set standards for managers involved in making employment-related decisions, and properly monitor the implementation of these standards, petitioners' approach would force employers to abandon the widespread practice of relying on and delegating such decisions to the discretion of supervisors and managers.

The present case offers a perfect example of how petitioners' reallocation of burdens would work a hardship on employers. Petitioners here contend that KAPL's practice of conferring discretionary authority on managers and supervisors was a proxy or vehicle for age discrimination, and thus the reliance on such discretion in completing the RIF matrix was unreasonable. Pet. Br. 7-8. Beyond the statistical evidence on which petitioners relied to

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* Under the allocation of burdens urged by petitioners, tremendous judicial resources would be diverted to resolving whether defendants had demonstrated the reasonableness of any employment decision that happened to correlate with age. Indeed, "every time a company tried to reduce its labor costs the federal courts would be dragged in and asked to redesign the reduction . . . ." *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1164 (7th Cir. 1992). The very purpose of the RFOA provision is to *prevent* courts from being dragged into such disputes.

make their prima facie case, however, petitioners offered no further evidence to rebut the reasonableness of KAPL's chosen RIF matrix. *Meacham II*, 461 F.3d at 145 (Pet. App. 18a) ("Plaintiffs, who bear the burden of demonstrating that KAPL's action was unreasonable, did not directly challenge the testimony of KAPL principals regarding the planning and execution of the IRIF."). Petitioners did not challenge the reasonableness of assessing the criticality and flexibility of an employee's skills in determining whether it would make sound business sense to retain that employee. Nor did petitioners establish that it was objectively unreasonable to delegate responsibility for assessing employees to front-line managers and supervisors who are in the best position to evaluate each employee and the anticipated needs of a given project or division.

Nevertheless, under the allocation of burdens urged by petitioners, it would fall to KAPL to prove that each of these decisions was reasonable, even though petitioners have never suggested any reason why the factors or methodology employed by KAPL were improper. KAPL thus would face liability based on little more than petitioners' prima facie statistical showing that KAPL's RIF policies resulted in terminations that correlated with age. Such a result would be contrary to the decisions of this Court and would work a substantial hardship on employers.

Petitioners' approach would encourage employers to abandon employment-related policies that incorporate elements such as flexibility and criticality or rely on manager's evaluations. When it comes to potential civil actions based on discriminatory employment decisions, most employers are risk averse, and justifiably so. *See Furnco Contr.*, 438 U.S. at 577

("We know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting."). Although employers' desire to avoid not only liability but also litigation doubtlessly has contributed to the elimination or reduction of many forms of workplace discrimination, that very desire to avoid potential lawsuits may overwhelm the legitimate business rationale behind policies similar to those at issue here.

If businesses are required to explain, demonstrate, and *prove* the reasonableness of the myriad of employment decisions that potentially correlate with age, employers will be saddled with a tremendous burden, given the multitude of employment decisions that involve managerial discretion and subjective employment criteria. Employers thus could face trial and liability exposure for doing little more than exercising discretion in running their business.

This inevitably would provide a strong impetus for employers to eliminate the exercise of discretion or use of criteria that involve any subjective analysis from their hiring, promotion, and RIF practices, for fear of ADEA disparate-impact claims. As the Court recognized in *Watson*, "the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures." 487 U.S. at 992.

To insulate the company from potential discrimination claims, an employer may feel pressure to rely on more demonstrably objective criteria in designing personnel policies, and choose to adopt a retention policy based on seniority, or on some quantitative measure of production, such as units manufactured, or hours worked, or number of customers served, or

dollar transaction handled. Each of these alternatives is fraught with problems.

As the current case illustrates, seniority-based policies may run afoul of applicable state statutes. *See Meacham I*, 381 F.3d at 71 (Pet. App. 53a-54a). And reliance on one or another potential productivity gauge ignores other critical employment factors, such as quality of work, employee versatility, contributions to the work of others, significance of one line of business as opposed to another, and the like. By pushing employers in the direction of basing employment decisions on objective criteria and away from discretionary judgments, petitioners' proposed allocation of the burden of proof will hinder employers' efforts to make personnel decisions that are tailored to their unique business needs. As the Court cautioned in the context of Title VII, placing the burden of persuasion on employers risks creating "a Hobson's choice for employers" that leads to "perverse results." *Watson*, 487 U.S. at 993. Ultimately, such policies will force employers to lay off employees who should be retained, or promote employees who should not have been promoted.

Given its conclusion that Congress did not intend Title VII to have "any chilling effect on legitimate business practices," the Court in *Watson* went to great lengths to explain how "the evidentiary standards that apply in these cases should serve as adequate safeguards against the danger that Congress recognized." *Id.* Adopting the allocation of burdens urged by petitioners is contrary to that conclusion as it will hamstring employers from making employment decisions based on business needs, thus effectively stripping employers of necessary decisional autonomy. Instead, companies will

increasingly turn to objective criteria to avoid potential discrimination claims. Although such practices may be more defensible in court, they are unlikely are to be justified from a business perspective, and can be expected to result in employment decisions that do not serve the need for a skilled, adaptable workforce.

In addition, placing the burden of proving the reasonableness of employment decisions on the employer would invite a finder of fact to second-guess the employer's legitimate business decisions, which properly fall within the realm of management prerogative. Under the allocation of burdens urged by petitioners, the decisive question in disparate-impact claims arising under the ADEA would be whether the defendant can prove, within the limits of the administrative and judicial processes, that the challenged practice was "reasonable"—a question that would lead inevitably to unwarranted second-guessing of employers' personnel decisions. As the Court has recognized, courts are ill-suited to make such judgments. *See Watson*, 487 U.S. at 999; *Rush v. United Technologies*, 930 F.2d 453, 458 (6th Cir. 1991) ("It is not appropriate for us to second guess the business judgment of employers in personnel matters.").

Only by maintaining the allocation of burdens set forth in *Wards Cove* will employers have the necessary room to make employment decisions based on business needs, rather than merely to avoid potential lawsuits. Under the *Wards Cove* allocation of burdens, employers would be able to continue to delegate many employment decisions to the discretion of managers and to continue to rely on the criticality and flexibility factors challenged here. Plaintiffs

would continue to bear the burden of showing that delegating the assessment of these factors was unreasonable. This approach would preserve not only the interests protected by the ADEA, but also the legitimate business interests of employers. Once employers have identified a proper business purpose for their decisions, plaintiffs can appropriately be asked to provide more probative evidence than the bare minimum needed to establish a prima facie case of disparate impact. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 265-66 (1989).

C. Petitioners' Approach Is Inconsistent with the Intent of the ADEA to Preserve Employer Discretion.

Adopting the approach urged by petitioners, to the extent that it inevitably constrains the discretion of employers, is inconsistent with the intent of the ADEA. When Congress enacted the ADEA, it plainly intended to preserve employer discretion so long as the employers' decisions were based on legitimate, non-discriminatory grounds.[9] As courts consistently have recognized, the ADEA was not intended to supersede traditional management prerogatives or to provide a vehicle for courts to second-guess a

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[9] The legislative history of Title VII similarly shows that Congress intended to preserve employer discretion in employment decisions. *See United Steelworkers v. Weber*, 443 U.S. 193, 206 (1979) ("Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that 'management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible.'" (quoting H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2516)).

company's business decisions. *See, e.g., Jorgensen v. Modern Woodmen of America*, 761 F.2d 502, 505 (8th Cir. 1985) ("The ADEA is not intended to be used as a means of reviewing the propriety of a business decision."); *Parcinski v. The Outlet Company*, 673 F.2d 34, 37 (2d Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983) (The ADEA "does not authorize the courts to judge the wisdom of a corporation's business decisions."); *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (The ADEA "was not intended as a vehicle for judicial review of business decisions.").

The text of the ADEA reflects [illegible] intent to preserve employer discretion. The R[illegible]OA provision, for example, makes clear that "the employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly." *Hazen Paper*, 507 U.S. at 611. At the same time, however, the RFOA provision also "insure[s] that employers [are] permitted to use neutral criteria not directly dependant [sic] on age." *EEOC v. Wyoming*, 460 U.S. 226, 232-33 (1983). Other provisions in Section 4(f) also protect an employer's right "to discharge or otherwise discipline an individual for good cause" and "to observe the terms of a bona fide seniority system." 29 U.S.C. §§ 623(f)(3); 623(f)(2). Taken together, these provisions make clear that "the statute does not constrain employers from exercising significant other prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995). The statutory scheme therefore is inconsistent with petitioners' argument that the burden of proof should lie with employers, a burden that predictably would push employers toward aban-

doning personnel policies that rely appropriately on managerial discretion and other legitimate business-related criteria.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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